

**LAW AND ORDER IN POSTCOLONIAL RACIAL CITIES: THE CASE OF BLACK GENOCIDE
IN RIO DE JANEIRO***

Abstract

This work analyzes the use of class actions in contesting the racial violence of state police during operations in majority black neighborhoods in the city of Rio de Janeiro, Brazil, where claims of black genocide and institutional racism were mobilized by petitioners. Analysis of this case reveals how spatial, racial and juridical structures create the conditions for enduring genocidal acts to be produced, whilst denialist discourses are deployed to normalize genocide and extra-judicial killings. The concept of institutional racism enables us to understand that genocide can also result from day-to-day decisions taken by politicians, legal professionals, and institutions. Through critical discourse analysis of legal-political debates, looking at case files and interviews with members of the judicial system, we assess institutional practice and theory, challenging the supposed innocence of the law in relation to race and space. To demonstrate the persistence of racist denialism, even when blacks' over-victimization is recognized, we also explore the normalization of current patterns of racial segregation and inequality, and the role of the justice system in securing the status quo.

Keywords: genocide; law; spatial justice; racial segregation; police violence

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Résumé

Cet article examine l'utilisation d'actions collectives pour contester la violence raciale de la police d'État de Rio de Janeiro (Brésil) lors d'opérations dans des quartiers majoritairement noirs. Le génocide noir et le racisme institutionnel ont été mobilisés par les pétitionnaires dans le cadre de ces actions en justice. La présente analyse révèle que les structures spatiales, raciales et juridiques permettent que ces actes génocidaires soient produits, tandis que les discours négationnistes normalisent le génocide et les exécutions extrajudiciaires. Le concept de racisme institutionnel permet de comprendre que le génocide peut également résulter de décisions quotidiennes prises par des politiciens, des professionnels du droit et des institutions. Grâce à une analyse critique du discours des débats juridico-politiques, à l'examen de dossiers et à des entretiens conduits avec des membres du système judiciaire, nous évaluons la pratique et la théorie institutionnelles, remettant en question la neutralité de la loi par rapport à la race et à l'espace. Pour démontrer la persistance du déni du racisme, même lorsque la survictimisation des Noirs est reconnue, nous explorons également la normalisation des modèles de ségrégation et d'inégalités raciales, ainsi que le rôle du système judiciaire dans la préservation du statu quo.

Mots-clés : genocide ; droit ; justice spatiale ; ségrégation raciale ; violence policière

INTRODUCTION

This study presents a socio-legal analysis of court cases that contest the racial bias of public security policy, particularly, the firing of weapons from helicopters by police, during operations in a majority black neighborhood in the city of Rio de Janeiro, Brazil.

Looking at how black genocide and institutional racism² were mobilized through legal-political debates around such police operations, we reflect on institutional practice and theory, challenging the supposed “innocence” of the law,³ in relation to race and space. To demonstrate the persistence of racism denial, even when blacks’ over-victimization is recognized, we engage with critical race theory and the theoretical propositions that look at racialized legal regimes as a continuum of racial slavery, alongside the role of the justice system in protecting the interests and rights of whiteness.⁴

By looking at legal debates around black genocide, we also assess spatial dynamics of racism, exposing the normalization of current patterns of racial segregation and inequality, and the role of the justice system in securing the status quo. In this sense, we question the alleged colorblindness of public security police practices and ground the spectacularization of physical violence as a means for racial normalizations of the public space. The normalization of patterns of racial segregation in Brazil evidences how space is shaped by racial and legal boundaries,⁵ as “the meaning of social space is, in large part, about social relations of power.”⁶

² Kwame Ture and Charles V. Hamilton, *Black Power: The Politics of Liberation in America* (Vintage Books 1992).

³ Peter Fitzpatrick, ‘Racism and the Innocence of Law’ in David Theo Goldberg (ed), *Anatomy of Racism* (University of Minnesota Press 1990).

⁴ For debates on whiteness and law see also: Cheryl I Harris, ‘Whiteness as Property’ 106 *Harvard Law Review* (1993) 1707 <<https://doi.org/10.2307/1341787>>. For Critical Race Theory in Brazil, see also: Dora Lúcia Bertúlio, *Direito e Relações Raciais: Uma Introdução Crítica Ao Racismo* (Lumen Juris 2019); Ana Luiza Pinheiro Flauzina, *Corpo Negro Caído No Chão: O Sistema Penal e o Projeto Genocida Do Estado Brasileiro* (1a ed, Contraponto 2008); Dina Alves, ‘Rés Negras, Juízes Brancos: Uma Análise Da Interseccionalidade de Gênero, Raça e Classe Na Produção Da Punição Em Uma Prisão Paulistana’ [2017] *Revista CS* 97 <<https://doi.org/10.18046/recs.i21.2218>>

⁵ Sherene Razack, ‘Introduction: When Place Becomes Race’ in Sherene Razack (ed), *Race, Space, and the Law: Unmapping a White Settler Society* (Between the Lines 2002)

⁶ David Delaney, *Race, Place and Law* (University of Texas Press 1998) 14.

This study is based on court case analyses and thirty-nine semi-structured interviews conducted from 2018 to 2020 with members of the judicial system, social movements and government officials in Brazil. This work is part of the project POLITICS: The politics of anti-racism in Europe and Latin America: knowledge production, political decision-making and collective struggles.⁷ The project aims to understand how power relations shape anti-racism in different contexts and the links between the global, national and local levels, as well as the processes of dialogue and conflict between grassroots organizations and institutions. The study case was selected because it demonstrates a representative experience regarding the judicialization of the black genocide. Therefore, interviewees included multiple actors related to the case that could reveal the different perspectives of the strategic litigation, connecting policing, grassroots organizations and the judicial system. Three interviews were extremely relevant to the comprehension of this case and their contributions were anonymized using the following fictitious names: Carlos Araújo, public defender; Carla Lúcia, public defender; and Luiza Nobre, Public Attorney.

As the same public security policy was the object of contestation in two different courts (the Rio de Janeiro State Court of Justice and the Supreme Federal Court), we examine the decisions at those two distinct levels. First, we look at the class action proposed by Rio de Janeiro Public Defender's Office in 2016 (*DPERJ v Rio de Janeiro State*)⁸ contesting the firing of weapons from helicopters during a police operation at

⁷ This article results from the research project POLITICS - The politics of anti-racism in Europe and Latin America: knowledge production, political decision-making and collective struggles. This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No ERC-2016-COG-725402)

⁸ *DPERJ v Rio de Janeiro State* [2016] TJRJ 0215700-68.2016.8.19.0001 [2019] DJRJ 1940.

Maré neighborhood, where the plaintiff's case was fully rejected.⁹ Then, we examine the ongoing claim made at the Constitutional Court by the Brazilian Socialist Party (*PSB v Rio de Janeiro State*)¹⁰, contesting the public security policy of the Rio de Janeiro State, where a subsequent injunction was partially granted.

The paper is divided in four sections: in the first section, we analyze the contestation around the use of helicopters to fire weapons in the Maré neighborhood during police operations, then how local organizations mobilized the legal system, managing to minimize the harms caused by state security policies based on militarization and confrontation. The second section sheds light on current debates about the black genocide in Brazil, while considering its historical antecedents and importance to the black movement. In the third section, we consider how the class action at the Constitutional Court, despite the best intentions of Rio de Janeiro's Public Defense Office in bringing this issue to the fore, can be considered a lost opportunity to articulate the debate of institutional racism. Finally, in the last section, we present our concluding remarks.

PART 1. THE USE OF HELICOPTERS: INSTITUTIONAL RACISM AND CLASS ACTION

In Rio de Janeiro, “police operations” often result in dead bodies, commonly attributed to stray bullets. The extent to which those deaths are intentional or not can be debated. However, one thing is certain: most of those bodies are black bodies. In 2019, 86% of deaths caused by the police in Rio de Janeiro were of blacks.¹¹ As the publication Violence

⁹ The court case *DPERJ v Rio de Janeiro State* is currently under appeal, so we looked at the initial decision issued by 6th Vara de Fazenda Pública in 2019

¹⁰ *PSB v Rio de Janeiro State* [2020] STF ADPF 635, [2020] DJe 267.

¹¹ Rede Observatório de Segurança, ‘A Cor Da Violência Policial: A Bala Não Erra o Alvo’ (2020).

Atlas (2020) shows, in 2018, the homicide victimization rate for blacks was 2.7 times higher compared to all the other racial groups.¹² In June 2016, one operation in Maré lasted the entire day. On that occasion, a representative from the community-based organization Redes da Maré, with the assistance of Rio de Janeiro's Public Defender's Office, denounced the situation to the judge on duty, demanding an end to the operation. The judge conceded an injunction affirming that police operations could not happen during the night and summoned police commanders and the secretary of the Security Department to explain the situation.¹³

After this injunction, Rio de Janeiro's Public Defenders Office (DPERJ) filed a class action¹⁴ to guarantee certain basic human rights, such as the need for search warrants to break into houses and the identification of police officers. Additional measures were that police operations could not coincide with the beginning and end of school classes, an ambulance was always to be present, and a plan for lethality reduction had to be drafted and implemented by the Security Department. The class action can be analyzed from different perspectives. First, in terms of its results, it did lead to a temporary reduction of police lethality (a reduction of 44% when comparing the first and second semesters of 2017) in Maré.¹⁵ Secondly, in terms of its objective, the class action

¹² Instituto de Pesquisa Econômica Aplicada (IPEA), 'Atlas Da Violencia v.2.7 - 2020' (2020).

¹³ Carlos Araújo, Public Defender, Rio de Janeiro, Public Defender's Office, (Rio de Janeiro, 18 December 2018).

¹⁴ The DPRJ acts both as legal counsel for low-income individuals and in the protection of collective rights, ensured mainly by Law 11,448 of 2007 and reaffirmed in a vote by the Supreme Federal Court (STF), whereby ministers unanimously decided that public defenders are also competent to file class actions (see case ADI 3.943 *CONAMP v Republic Presidency* [2018], STF DJE 153 01/08/2018).

¹⁵ Redes da Maré. Boletim 'Direito à Segurança Pública na Maré' (2017) <https://www.redesdamare.org.br/media/downloads/arquivos/BoletimSegPublica_2017.pdf>, accessed on 13.04.2021.

was not aimed at implementing measures promoting profound changes to social structures or institutionalized order. In fact, it only required respect to legality and basic human rights law. Lastly, one can understand this class action by the internal discussions it generated inside the juridical field and state institutions, particularly by bringing the argument of institutional racism.

Considering the results and the aims of the DPERJ class action (including the objective of raising awareness to institutional racism), one can easily see the role that the justice system plays in the black genocide, since when effectively pressured by grassroots movement, including black movements and institutions created inside Rio de Janeiro's favelas, measures were implemented to reduce police lethality. The recognition that the genocide results from institutional racism does not mean that this state of things is impossible to change; it means that localized changes in specific institutions and activities aiming to combat interpersonal racism alone will not suffice. If the number of black deaths can be reduced by a single judicial decision, then the process can be better understood by comprehending how judges and other members of the justice system refuse to take the necessary measures to combat black death, rather than an analysis of how individuals decide to implement genocide –a question more of impacts of colorblindness in the legal system than intentionality. More importantly, one needs to understand how, despite this lack of essential action to avoid breaches of constitutional rights, the idea that justice is failing is not a consensus view. In fact, as public defender Carlos Araújo affirmed during an interview, protecting life is not what “society” wants:

This [black genocide] is not the result of mismanagement, it is the management of chaos. But those who draw these political guidelines are the people who are

there and who have wide social support. Society wants it that way, at least most of society wants it.¹⁶

By “society,” the public defender probably means specific groups of Brazilian society, who currently defend greater access to guns, more offensive and even deadly public security policies, among other projects associated with the rise of the far-right. However, as analyzed by Vargas and Alves,¹⁷ most accounts of the emergence of the far-right in Brazil fail to identify antiblackness as a central factor. Two high ranking officers at the DPERJ mentioned the class action as an example of anti-racist activity promoted by the institution. However, it is not our objective to assess if the work conducted by the DPERJ is effectively anti-racist. Instead, we consider it relevant to stress how the debate about institutional racism and genocide is being brought to the juridical field. As the public defender Carlos Araújo affirms:

Our work in the defense makes racism more evident in cases of violence. First, because we bring this argument to our main actions, as in the case of the class action for police operations in Maré. This is one of the main points of the argument. In the development of this class action, which is to prohibit the use of helicopters as a shooting base in favelas, this argument of discrimination is also

¹⁶ Carlos Araújo, Public Defender, Rio de Janeiro, Public Defender’s Office, (Rio de Janeiro, 18 December 2018). All sources have been anonymized and the names used in this article are pseudonyms.

¹⁷ Jaime A Alves and João Costa Vargas, ‘The Spectre of Haiti: Structural Antiblackness, the Far-Right Backlash and the Fear of a Black Majority in Brazil’ (2020) 41 *Third World Quarterly* 645.

widely used. We use this argument as a way of denouncing the criminalization of the territory (...).¹⁸

A second public defender, Carla Lúcia, when asked whether institutional racism was a structural element in police violence, recognized that this was the case and revealed that legal arguments using the element of racism are systematically attacked and denied:

I believe that yes it [racism] is a structuring element of these violent practices by the agents of the state and here in the city of Rio de Janeiro, where we have been acting. This translates very geographically; most of the cases that come to us are cases in which black communities are victimized in the favelas. These are places where the activity of the security forces is, by definition a violent act, a violent presence, a violent work methodology, and it puts the lives of all those people at real risk and, really, it is a battle to insert this, this perspective in the institutions of the State, that would be responsible or competent to deal with cases of violence. There is no global understanding of this phenomenon as a racist phenomenon, on the contrary, some class actions of ours, for example the class action of Maré, (...) in which the state general attorney made a whole legal argument to eliminate the argument of racism that the public defender took to the litigation. Hence, it is not only a difficulty in assimilating practices and transforming them through different perspectives to be able to face the problem, but there is an effort really to deny that racism exists.¹⁹

¹⁸ Carlos Araújo, Public Defender, Rio de Janeiro, Public Defender's Office, (Rio de Janeiro, 18 December 2018).

¹⁹ Carla Lúcia, Public Defender, Rio de Janeiro, Public Defender's Office, (Rio de Janeiro, 26 February, 2019).

Carlos Araújo also observed that using the argument of institutional racism in legal processes raised a lot of concern in the judiciary, the District Attorney's Office or even inside the DPERJ. According to him, even though different government spheres openly justify police brutality, racism is still denied and remains a problematic argument. In the DPERJ complaint to the Rio de Janeiro State Court, one can read:

(...) the use of helicopters by the security forces in the State of Rio de Janeiro reveals another dimension of its perversity and reinforces the unconstitutionality of the measure, due to the indirect violation of the right to equality as non-discrimination. The use of helicopters, restricted exclusively to non-white spaces and socio-economically vulnerable areas in the city, either as [a] shooting or observation platform, subjects specific populations to psychological terror imposed by flyovers, aerial shots and enhanced exposure to life threatening situations. Those actions contradict the constitutional principle of equality, understood as non-discrimination, enshrined in Art. 3, item IV, and 5, caput, CRFB / 88 and also within the scope of article 24 of the American Convention on Human Rights. It is also possible to affirm that the actions of the Civil and Military Police, delimited to the vulnerable spaces of the city, is representative of the institutional racism that imbues the security policy in the state.²⁰

The use of helicopters to fire weapons from is an important example of how Rio de Janeiro plans its police operations, assuming the risk of civilian deaths. In most interviews with agents of the justice system, they were asked whether they thought there was an ongoing genocide in Brazil. Most interviewees considered that it would be difficult

²⁰ *DPERJ v Rio de Janeiro State* [2016] TJRJ 0215700-68.2016.8.19.0001 [2019] DJRJ 1940, 40.

to establish genocide as a court case, since proving whether a public agent or the state had the intent to commit genocide is extremely hard,²¹ especially when security forces are only “fighting crime.” This need to prove intentionality led the defender Carla Lúcia to use the expression “intentionality trap,” in the sense that by trying to prove intentionality on the part of a specific agent, one can fall into narratives that individualize the problem. Since racism is a structural problem, one may find that intentionality is not rooted only in one person’s thinking,²² but rather distributed through different agents and institutions.²³ Nonetheless, we are not discussing completely unintentional acts, otherwise, changes in the legal framework would not produce changes in the way policing is conducted. When police officers pull the trigger, this is the result of political decisions, legal procedures, academic thought, and media framing. This concept is revealed by the objective of this member of the DPERJ to impact the security structures:

We try to think of genocide as a legal instrument without falling into the trap of intentionality. I think that a challenge (...) is how to migrate from the accountability of the agents that pull the trigger to the decision-making spheres. I think that in this situation the legal conception of genocide can fit. We have studied and meditated (...) new strategies out of the most ordinary judicialization

²¹ Leo Kuper, ‘Theories of Genocide.’ (1981) 4 *Journal of Ethnic and Racial Studies*.

²² Charles R Lawrence III, ‘The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism’ (1987) 39 *Stanford Law Review* 317; Peggy Cooper Davis, ‘Law as Microaggression’ (1989) 98 *Yale Law Journal*.

²³ Alfred Gell, *Art and Agency: An Anthropological Theory* (1998); Nick Enfield, ‘Distribution of Agency’ in Nick Enfield and Paul Kockelman (eds), *Distributed Agency* (Oxford University Press 2017).

that we are used to implementing so that we can really have an impact on security structures.²⁴

The decision from Rio de Janeiro's State Court, in addition to overruling the DPERJ request, mentions the racial issue when referring to the response of Rio de Janeiro's State Government, but only to deny its relevance. It is important to note that while the DPERJ mobilizes the concept of institutional racism, the State of Rio de Janeiro argues that the hypothesis of racism is "completely ruled out,"²⁵ since the majority of the "police force is of African descent."²⁶ However, if a "racial war" is not the case, the court seems to acknowledge another war, the one between "security forces and organized crime."²⁷ The State of Rio de Janeiro's Government response to the demands of the DPERJ in the class action reinforced the arguments for the "war on crime," as necessary to protect the community through police operations:

Attach photos of criminals on motorcycles carrying long-range rifles, traveling in daylight through the favela, posting group photos to exemplify that the situation is much worse than imagined by the population and, therefore, the Police act in defense of the orderly population that inhabits the communities of Complexo da Maré.²⁸

According to Rio's State Government (a position endorsed by the judge) all of the violence impinged against territories with a vast majority black population is unrelated

²⁴ Carla Lúcia, Public Defender, Rio de Janeiro, Public Defender's Office, (Rio de Janeiro, 26 February, 2019).

²⁵ *DPERJ v Rio de Janeiro State* [2016] TJRJ 0215700-68.2016.8.19.0001 [2019] DJRJ 1940, 2.

²⁶ *ibid* [2].

²⁷ *ibid* [3].

²⁸ *ibid* [3].

to racism. All that violence and disrespect for human dignity, including the firing of heavy weaponry from above, serves to protect the community. At the same time, all the mobilization seeking to guarantee basic rights points to completely different conclusions. First, racism is indeed a driving force behind police brutality, and it conditions the justice system and all government spheres. Secondly, the community does not feel protected by the ways police operate, supposedly on their behalf.²⁹

On July 5th 2018, members of the project POLITICS were at an event organized by the community-based forum “*Basta de Violência!*” (Enough of Violence) called “*Perturbando o Juízo*” (Disturbing the Court), in Maré, to demand that government agencies apply the Harm Reduction Plan in police operations. Of all the invited institutions, including the Public Security Department, civil police, military police, and the District Attorney’s Office, only the DPERJ sent a representative. This example reveals how people in the justice system appear unwilling to “disturb the court,” as evident in Rio de Janeiro District Attorney’s Office’s decision not to send any representatives to this event due to its name, “Disturbing the Court.” Luiza Nobre, a public attorney interviewed for this research, commented on the title of the event: “Society must disturb the court, not the District Attorney’s Office.”³⁰ From the analysis of the interview, one can conclude that the prosecutor’s concern was to guarantee the institutions’ neutrality and avoid taking actions that could be interpreted as political. We also consider the hypothesis that by not attending the event, the public attorney could be also protecting the institution

²⁹ Palloma Menezes, ‘O Problema Da Aproximação No “Policamento de Proximidade”’ [2018] Trabajo y sociedad: Indagaciones sobre el empleo, la cultura y las prácticas políticas en sociedades segmentadas, ISSN-e 1514-6871, N°. 31, 2018, págs. 51-73 51.

³⁰ Luiza Nobre, Public Attorney, Public Attorney’s Office, (online interview, 17 April 2019).

that is responsible for the external control of police activity and, by attending, their work could face questioning by community activists.

PART 2. BLACK GENOCIDE IN BRAZIL: ANTECEDENTS

For decades, black movements have denounced the black genocide in Brazil with little impact on public institutions. To understand the structural conditions behind the need to control the black body and how white fear is exercised to justify genocide,³¹ presupposes looking at the historical continuum of racial slavery, and how it has sustained both subordination and privilege through racial lines.³² In this context, black death is central to sustaining power relations, as “rigidly hierarchical societies need the death ceremonial as a spectacle of law and order.”³³ The assassination of Marielle Franco, a black woman from *Maré* who was elected to the city council of Rio de Janeiro and denounced police violence,³⁴ is a notorious example of public performance of black death and how it continues as a central exercise in maintaining our social structure and our

³¹ Ana Luiza Pinheiro Flauzina, ‘Corpo Negro Caído No Chão: O Sistema Penal e o Projeto Genocida do Estado Brasileiro’ (Mester in Law, Universidade de Brasília UNB 2006).

³² Saidiya V Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (Oxford University Press 1997) 24.

³³ Vera Malaguti Batista, *O Medo Na Cidade Do Rio de Janeiro: Dois Tempos de Uma História* (Editora Revan 2003) 32.

³⁴ Marielle Franco was elected in 2016 for a seat on the City Council of Rio de Janeiro with five times the number of votes of her nearest competitor. Being a black woman from Maré, a slum in Rio de Janeiro, her election was a historical event in majority white-male political environment. Franco was critical to the police violence, and she was assassinated in 2018 by two former police officers. Her assassins are already in custody, but until today no answer has been given on who’s behalf they were acting on (see more at ‘Caso Marielle e Anderson: PM reformado e ex-PM são presos suspeitos do crime’ (*GI*) <<https://g1.globo.com/rj/rio-de-janeiro/noticia/2019/03/12/policia-prende-suspeitos-pelos-assassinatos-da-vereadora-marielle-franco-e-anderson-gomes.ghtml>> accessed 17 June 2021.).

racial democracy myth.³⁵ Even if the scope of this work does not allow us to deepen this historical connection, several studies on criminal justice in Brazil have demonstrated “the limits and possibilities of ‘human rights’ in dealing with racialized bodies that are deemed to be outlawed, abject, and non-human,”³⁶ revealing how anti-black racism functions through mass incarceration and criminal selectivity as a continuum of racial slavery.³⁷ The black majority of the country’s population during racial enslavement and after the abolition was a great source of white fear that has mobilized violent control of the black body³⁸ - the fear of Haiti or black insurrection³⁹ - to sustain the white-controlled space.⁴⁰ The situation in Brazil is so alarming that even the Constitutional Court has recently declared in the case *PSOL v Federal Union*⁴¹ the existence of an

³⁵ Jaime Amparo Alves, *The Anti-Black City: Police Terror and Black Urban Life in Brazil* (University of Minnesota Press 2018).

³⁶ Jaime Amparo Alves, ‘Neither Humans nor Rights: Some Notes on the Double Negation of Black Life in Brazil’ (2014) 45 *Journal of Black Studies* 143, 146. <<https://doi.org/10.1177/0021934714524777>>

³⁷ Dina Alves, ‘Rés Negras, Juízes Brancos: Uma Análise Da Interseccionalidade de Gênero, Raça e Classe Na Produção Da Punição Em Uma Prisão Paulistana’ [2017] *Revista CS* 97; Evandro Piza Duarte and Felipe da Silva Freitas, ‘Racism and Drug Policy: Criminal Control and the Management of Black Bodies by the Brazilian State’ in Kojo Koram and ProQuest (Firme), *The war on drugs and the global colour line* (2019); Felipe da Silva Freitas, ‘A naturalização da violência racial: escravismo e hiperencarceramento no Brasil’ [2019] *Perseu: História, Memória e Política*; Sérgio Adorno, ‘Racismo, Criminalidade Violenta e Justiça Penal: Réus Brancos e Negros Em Perspectiva Comparativa’ (1996) 18 *Estudos Históricos*, Rio de Janeiro 22.

³⁸ Luciano Góes, *A ‘Tradução’ de Lombroso Na Obra de Nina Rodrigues: O Racismo Como Base Estruturante Da Criminologia Brasileira* (Editora Revan 2016).

³⁹ Marcos V Lustosa Queiroz, *Constitucionalismo brasileiro e o Atlântico Negro: a experiência constituinte de 1823 diante da Revolução Haitiana* (2nd edn, Lumen Juris 2018).

⁴⁰ Vera Malaguti Batista, *O Medo Na Cidade Do Rio de Janeiro: Dois Tempos de Uma História* (Editora Revan 2003).

⁴¹ *PSOL v Federal Union* [2020] STF ADPF 347 [2020] DJe-165, 1.

“unconstitutional state of things” regarding the Brazilian prison system, despite leaving patterns of institutional racism unchallenged.⁴²

In 2013, the program *Juventude Viva* (Alive Youth) was created from a partnership of fifteen departments of the Federal Government, coordinated by the Secretariat for the Youth and National Secretariat for Racial Equality,⁴³ to fight the alarming number of black youth murders and the major role of the police in extrajudicial executions.⁴⁴ The first axis of the policy aimed “to deconstruct the culture of violence,”⁴⁵ recognizing that “violent actions against black youth were historically naturalized”⁴⁶ and that those patterns should be addressed. Nevertheless, the means enumerated as part of the government actions were mostly symbolic and do not commit to any structural change. The policy document resorts to an old formula of “capacity building” and “raising awareness in the police force.”⁴⁷ The program guide states that “achieving these objectives can be done in a variety of ways, including public utility campaigns in the media, raising awareness and educating institutional agents, mobilizing social actors to promote the rights of black youth, among others.”⁴⁸ The actions to confront institutional racism were mostly seen through the lens of capacity building, as if racism is reproduced because individuals who are part of those institutions are not sufficiently educated or

⁴² Ana Flauzina and Thula Pires, ‘Supremo Tribunal Federal e a Naturalização Da Barbárie’ (2020) 11 *Revista Direito e Práxis* 1211. <<https://doi.org/10.1590/2179-8966/2020/50270>>

⁴³ Federal Steering Committee of the *Juventude Viva* Plan - CGJuV was formally instituted through Interministerial Ordinance No. 29, of May 22, 2013.

⁴⁴ Secretaria Nacional de Juventude, ‘Plano Juventude Viva: Guia de Implementação Para Estados e Municípios’ (Secretaria Nacional de Juventude (SNJ/SG-PR) 2014).

⁴⁵ *ibid* 8.

⁴⁶ *ibid* 8.

⁴⁷ Secretaria Nacional de Juventude 10.

⁴⁸ *ibid* 8.

sensitized to topics such as human rights.⁴⁹ The only goal that deviates from this narrative is to “strengthen monitoring institutions,”⁵⁰ which in the case of the police in Brazil, refers to the Public Attorney’s Office, an institution that despite its generous budget, has been negligent towards police mass killings. In 2016, an inquiry commission at the National Senate concluded that there is an ongoing genocide in the country, attesting that “the Commission, from the beginning, faced a cruel and undeniable reality: the Brazilian State, directly or indirectly, causes the genocide of the young and black population.”⁵¹ Describing a scenario that can be hardly ignored, the commission set out a series of recommendations, including changes to the militarized police structure.⁵²

Despite some immediate efforts to tackle black assassination, its naturalization is a real challenge, particularly when looking at racism as a process of dehumanization. Silvio Almeida, in dialogue with Foucault’s idea of biopower, explains how racism operates as a condition for exercising power, which includes “exposure to the risk of death, political death, expulsion and rejection.”⁵³ In addition, “another function of racism is to allow a positive relationship to be established with the death of the other.”⁵⁴ The individual’s security or freedom is felt when the abnormal other is eliminated, putting into practice what Achille Mbembe conceptualizes as necropolitics.⁵⁵ This is so deeply imprinted in our racist routines that even the fact that Brazil accounts for 10% of

⁴⁹ Silvia Rodríguez Maeso and Marta Araújo, ‘The Semantics of (Anti-)Racism in the Governance of Non-Europeanness: An Introduction’ (2017) 51 *Patterns of Prejudice* 1. <<https://doi.org/10.1080/0031322X.2016.1270499>>

⁵⁰ Secretaria Nacional de Juventude (n 42) 10.

⁵¹ Lindbergh Farias, ‘Relatório Final CPI Assassinato de Jovens’ (Senado Federal 2016) Comissão Parlamentar de Inquérito SF/16203.78871-55.

⁵² *ibid* 88.

⁵³ Silvio Almeida, *Racismo Estrutural* (Djamila Ribeiro ed, Pólen 2019) 115.

⁵⁴ *ibid* 115.

⁵⁵ Achille Mbembe, ‘Necropolitics’ (2003) 15 *Public Culture* 11.

the world's violent deaths does not move the political dial; on the contrary, an openly pro-violence candidate was elected President, with a discourse to both arm the population and to guarantee that the police can “do their job,” which essentially means the legalization of extra-judicial killings. To fulfill this intent, a bill was presented by Bolsonaro's Justice Minister to promote changes in the Penal Code known as the ‘anti-crime pack’.⁵⁶ This bill was denounced for legalizing black genocide, since it provided an exclusionary rule for police officers, justifying any actions resulting in death, because “excess arises from excusable fear, surprise or violent emotion.” Fortunately, this proposition was not approved by the National Congress. Nonetheless, this example illustrates Vargas and Alves's argument that Brazil's turn to the far-right is entrenched in anti-blackness;⁵⁷ especially when considering that the common saying “a good bandit is a dead bandit” became a victorious presidential campaign slogan amidst denunciations of black genocide.

In 1978, Abdias do Nascimento published the book *O Genocídio do Negro Brasileiro: Processo de um Racismo Mascarado* (The Genocide of the Brazilian Black: The process of a masked racism) that became a milestone in establishing the debate about black genocide as a battleground for black movements in Brazil. For decades, use of the term ‘genocide’ to denounce the mass killing of blacks in Brazil has been contested, but limited by the legal control of its meaning. Legal knowledge sustains that the “*intent*

⁵⁶ Lorreine Carvalho da Silva, “‘Pacote Anticrime’ representa tentativa de aprofundar o racismo antinegro no Brasil” (*Justificando*, 29 August 2019) <<http://www.justificando.com/2019/08/29/pacote-anticrime-representa-tentativa-de-aprofundar-o-racismo-antinegro-no-brasil/>> accessed 17 June 2021.

⁵⁷ Jaime A Alves and João Costa Vargas, ‘The Spectre of Haiti: Structural Antiracism, the Far-Right Backlash and the Fear of a Black Majority in Brazil’ (2020) 41 *Third World Quarterly* 645 <<https://doi.org/10.1080/01436597.2019.1695116>>

to destroy, in whole or in part”⁵⁸ a specific group, is fundamental to the crime of genocide.⁵⁹ Considering that black genocide results from institutional racism, the conditions allowing it to happen are not just associated with intent. Black genocide is implemented through the normal functioning of justice institutions, as we discuss in the case study. Law, seen as universal and abstract, “holds to the basic premise that definition from above can be fair to those below,” meanwhile, in a racialized society, white privilege is also about the right to establish norms, and to guarantee the “expectation of white-controlled institutions in the continued right to determine meaning - the reified privilege of power” as Harris suggests.⁶⁰

During the COVID-19 pandemic, the use of the term genocide gained widespread use in hegemonic and social media. This provides an important opportunity to discuss the connection between the political and legal uses of the term. The COVID-19 pandemic affects mostly black and indigenous communities, access to healthcare is more difficult for those sectors of the population and even the pace of vaccination has been slower for blacks.⁶¹ Nonetheless, discussing the concept of genocide, without considering institutional racism is a mistake. By not relating these two concepts, one risks making a flawed use of the term, both in a political and legal sense. After all, the idea that the pandemic does not choose race or class is not true and this narrative has to be challenged.

⁵⁸ Article II United Nations General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide 1948.

⁵⁹ Kai Ambos, ‘What Does “Intent to Destroy” in Genocide Mean?’ (2009) 91 *International Review of the Red Cross* 833.

⁶⁰ Cheryl I Harris, ‘Whiteness as Property’ (1993) 106 *Harvard Law Review* 1707, 1762. <<https://doi.org/10.2307/1341787>>

⁶¹ Data produced by APublica journalism, media report available at <<https://apublica.org/2021/03/brasil-registra-duas-vezes-mais-pessoas-brancas-vacinadas-que-negras/>>, accessed on 02.04.2021.

For all these reasons, it is even more important to remember the struggles of the black movement and the use of the term genocide. The widespread adoption of the term can be useful if it is accompanied by an increasing awareness of how institutional racism is affecting blacks and indigenous populations. Otherwise, there is a risk that the term genocide might gain visibility and currency in social media, without any real discussion of race or racism, which would itself signify a new trend in terms of denialism. One of the most important aspects of Nascimento's book was his critique of the social construction of Brazilian society as a racial democracy. Accompanied by other studies,⁶² Nascimento argued that Brazil was far from being a racial paradise; instead, the Brazilian black suffered a process of genocide that was structural. Still, even though racism structures Brazilian society, he was discussing a process that is masked, as the book's subtitle indicates ("the process of a masked racism").

In a dialogue with Fanon, Nascimento retrieves the argument that "the purpose of the racist has become a purpose that is haunted by bad faith."⁶³ This citation is relevant in the sense that by masking racism, one is not simply denying its existence, but actively producing structures that serve to present it with a new face. Therefore, as institutional racism is increasingly debated, the masking of racism might assume unexpected faces. Therefore, it is important that the renewed debate about genocide exposes racial inequalities, instead of obscuring them.

⁶² Florestan Fernandes and Roger Bastide, *Branços e Negros Em São Paulo* (Global Editora 2015); Florestan Fernandes, *O Negro No Mundo Dos Brancos* (Global Editora 2015).

⁶³ Abdias do Nascimento, *O Genocídio Do Negro Brasileiro: Processo de um Racismo Mascarado* (Paz & Terra ed, 1978) 44-45

PART 3. CLASS ACTION AT THE CONSTITUTIONAL COURT: A LOST OPPORTUNITY?

Despite the growing consensus that violence, particularly police violence, disproportionately impacts black people, there is still difficulty in articulating racism in legal reasoning in court cases targeting police killings. The analysis of legal arguments and debates from the petitioners, *amicus curiae* and the justices' opinions in the case *PSB v Rio de Janeiro State*, reveals some of the challenges in incorporating racism into legal reasoning and providing justice to its victims. The case is still ongoing, but the apparent partial “victory” that came when the Supreme Court issued the injunction to stop police operations during the COVID pandemic, should be carefully analyzed as the arguments used to recognize black over-victimization can reinforce racial stereotypes, particularly associated with spaces inhabited by the black population in Brazil.

Going through the 198 pages of the Constitutional Court injunction decision, it becomes evident how legal reasoning resorts to formalism and procedural debates to evade direct confrontation with substantive matters, such as institutional racism. Considering the law as an independent and “auto-referential system”⁶⁴ means downplaying power relations and the importance of the law to sustain hegemony. Despite withstanding strong criticism, this approach “still shapes the predominant conventional sense of what – or where – law is.”⁶⁵ The focus on formalities and taking black victimization as a *datum*,⁶⁶ with no further consequence to the justice provision, can shield institutions of justice from the repercussions of black genocide.

⁶⁴ Marianne Constable, Leti Volpp and Bryan Wagner (eds), *Looking for Law in All the Wrong Places: Justice Beyond and Between* (Fordham University Press 2019) 2.

⁶⁵ *Ibid* 2.

⁶⁶ Denise Ferreira da Silva, *A Dívida Impagável* (Living Commons 2019).

The majority Justice's opinion reasons that the judiciary could not define the standards for the use of helicopters in police operations since their deployment must be assessed by the Public Security Department. The problem of "wrong assessment" or "civil causalities" can be solved by implementing "accountability measures," such as writing a report after each operation, so if there is excessive violence, the competent external accountability officer must exercise the external control.⁶⁷ The fact that choices were made to increase police lethality (such as changes in individual evaluation according to number of deaths⁶⁸), alongside an evident continuum in human rights violations, were not considered as evidence for judicial intervention. This conclusion results from the fact that the outcomes of such operations were not incompatible with the expectations of the justice system. The fact that the governor himself joined such operations, riding in a helicopter and declaring in public media that police must "aim at the head,"⁶⁹ shows a clear political preference for extra-judicial killings. Nevertheless, demands to sanction the governor's hate speech were considered a threat to freedom of expression and separation of powers.⁷⁰

⁶⁷ It is the competence of the District Attorney's Office to carry out the so-called external control of police activity, this control is the target of much criticism by social and academic movements consulted during the research. The prosecutor herself revealed difficulties in controlling police activity. Among other reasons, she argued that the office has difficulties in circumventing the police narrative, which is accepted as being the official one.

⁶⁸ This is one of the few arguments brought by the petitioner that made clear the choices made by the State to promote extra-judicial killings and the injunction decision suspended the efficacy of this specific command of the regulation.

⁶⁹ "A polícia vai mirar na cabecinha e... fogo", afirma Wilson Witzel <<https://noticias.uol.com.br/ultimas-noticias/agencia-estado/2018/11/01/a-policia-vai-mirar-na-cabecinha-e-fogo-afirma-wilson-witzel.htm>> accessed 17 June 2021.

⁷⁰ *PSB v Rio de Janeiro State* [2020] STF ADPF 635, [2020] DJe 267, 94.

The only justice's opinion that recognized the racist patterns of police operations acknowledges the double standards in spatial choices, by saying that "police lethality in Brazil (...) has a color: blacks are those who die the most:"⁷¹

these cases demonstrate that the approach of the security forces in the city and in the State of Rio de Janeiro follows absolutely different patterns depending on the place, origin and skin color of its citizens. It is practically impossible for a helicopter flyover or a police approach in the South Zone of Rio de Janeiro to result in cases such as those reported above.^{72 73}

Regardless of this acknowledgement, the justice's dissenting opinion considered that those situations are "flaws of the criminal justice system in its practical application, which often is completely out of the control of the Judiciary or the institutions."⁷⁴ Despite recognizing racially directed violence, the court excuses the justice system by personalizing the practice, either as the individual decision of the police officer or by considering the outcomes as procedural flaws. As Cheryl Harris comments on a similar situation with the United States of America's Supreme Court, "it is unacceptable for the Court to ignore the infringement or violation of a constitutionally protected right because of concerns about the proper institutional role of the judiciary."⁷⁵ The author has evidenced that colorblind decisions, when proven disadvantage is presented, are "ratified as an accepted and acceptable base line,"⁷⁶ ignoring the substantial inequality that

⁷¹ *ibid* [170] (Gilmar Mendes).

⁷² *ibid* [172] (Gilmar Mendes).

⁷³ Authors' free translation from original in Portuguese.

⁷⁴ *ibid* [168] (Gilmar Mendes).

⁷⁵ Cheryl I Harris, 'Whiteness as Property' (1993) 106 *Harvard Law Review* 1707, 1753

⁷⁶ Harris (n 15) 1753.

privileges whites. The judiciary works to ratify inequality when it recognizes the racial bias of the state practice, but at the same time, normalizes the systematic production of differentiation.

Furthermore, there was abundant proof that both the police and part of the judicial system were acting *contra legem*. Nonetheless, the argument that the constitutional court's thesis needs to be evaluated in abstraction simply reinforces the view that formalism is used to evade debates on institutional racism. The use of legality to justify the absence of a need to change the institutional arrangement, even in the face of systematic violation of the law, is to ignore factual reality and hide in the thesis of abstraction. The data has proven, for instance, that the Public Attorney's Office was negligent. The Educafro *amicus curie* brief raised a series of concerns, such as the fact that "98% of the cases of extra-judicial killings that occurred between 2010 and 2015 were archived or closed at the request of the Public Attorney's Office or by the Rio de Janeiro State Court of Justice."⁷⁷ But the majority opinion did not consider the *amicus'* argumentation, mostly filled by organizations of the black movement, and instead accepted the District Attorney's Office argument that they are still implementing the IAHRC decision on the case *Brazil v. Favela Nova Brasilia*, which specifically ordered that any investigation on police killings was not to be conducted by the institution under investigation.⁷⁸

The challenge of identifying racism within the existing legal regime is an even deeper problem. Claims for black lives or black constitutional rights can fall into old racist traps that have historically conditioned their exercise with arguments such as

⁷⁷ Educafro Amicus Curie's brief, *PSB v Rio de Janeiro State* [2020] STF ADPF 635, [2020] DJe 267, 24.

⁷⁸ *PSB v Rio de Janeiro State* [2020] STF ADPF 635, [2020] DJe 267, 74.

“public interest” or “public security.”⁷⁹ The unconstitutionality of the public security policy of the State of Rio de Janeiro was argued in the PSB complaint made in *PSB v Rio de Janeiro State* relation to central principles of the Constitution: human dignity, right to life, equality, security, home inviolability and child rights. For example, the right to life is highlighted, but little is said about the exceptions provided for by the Brazilian Constitution, such as self-defense or strict compliance with legal duty, which are constantly mobilized by the police to justify the high number of casualties. In this sense, the PSB complaint exposed in detail the flaws in the public security policy, as well as recent changes that aggravated police lethality, describing the statistics that blacks are most of the victims of violence, but with argumentation that does not confront the colorblindness of the “war on drugs”⁸⁰ or the double standards of police practice in black and white neighborhoods. In addition, it does not challenge old racist constructions, such as the association of blackness to criminality and favelas with poverty, that naturalize the spatialized black genocide.⁸¹

One racist presumption that resonates in court decisions - also largely present in classic criminology - is the relation between poverty and criminality, naturalizing economic and social conditions for crime.⁸² In this argument, the living conditions, the lack of opportunities in education or jobs are mobilized to justify an affiliation with a criminal life. This argument has been historically used to de-politicize the public security

⁷⁹ Evandro Piza Duarte and Felipe da Silva Freitas, ‘Racism and Drug Policy: Criminal Control and the Management of Black Bodies by the Brazilian State’ in Kojo Koram and ProQuest (Firme), *The war on drugs and the global colour line* (2019).

⁸⁰ Kojo Koram, ‘Introduction’ in Kojo Koram (ed), *The War on Drugs and the Global Colour Line* (Pluto Press 2019).

⁸¹ Alves (n 33) 10.

⁸² Gizlene Neder, *Iluminismo Jurídico-Penal Luso-Brasileiro: Obediência e Submissão* (Instituto Carioca de Criminologia: Freitas Bastos Editora 2000) 15.

choices of control and surveillance of black communities.⁸³ Secondly, some areas of the city - majority black neighborhoods – are the preferred target of police operations, but only because they are seen as pockets of poverty. These two arguments tend to reinforce an idea that favelas are places of destitution and then, there is a natural association with criminality, justifying the fact that those areas are subject to deadly police operations.⁸⁴

One example of those naturalized arguments is the precedent from the Superior Court of Appeal in the case *TJRJ v Cidadãos e Cidadãs Domiciliados nas Favelas do Jacarezinho e Conjunto Habitacional Morar Carioca*⁸⁵ - quoted by the petitioner at *PSB v Rio de Janeiro State* as a paradigmatic precedent -, whereby the use of collective search warrants (with no individualization of the people of interest) by the Rio de Janeiro Police, with the validation of the state court, were understood as “notoriously illegal.” Nonetheless, the arguments of the precedent are quite elucidative on how racist presumptions perpetuate, even in decisions that protected constitutional rights:

Local anguish and vicissitudes are even understandable to explain the reasons that lead administrative authorities to postulate and judicial authorities to authorize searches and seizures in different locations, without indicating the addressees of these measures - as possible authors of the acts that are the object of the investigations - and without identifying, **with as**

⁸³ Ana Luiza Pinheiro Flauzina, *Corpo Negro Caído No Chão: O Sistema Penal e o Projeto Genocida Do Estado Brasileiro* (1a ed, Contraponto 2008).

⁸⁴ Hattery A and Smith E, *Policing Black Bodies: How Black Lives Are Surveilled and How to Work for Change* (Updated edition, Rowman & Littlefield 2021); Cashmore E, *Out of Order?: Policing Black People* (Routledge 2013) and Weissinger SE, *Law Enforcement in the Age of Black Lives Matter: Policing Black and Brown Bodies* (Lexington 2017).

⁸⁵ *TJRJ v Cidadãos e Cidadãs Domiciliados nas Favelas do Jacarezinho e Conjunto Habitacional Morar Carioca* [2019] STJ HC n° 435-934-AgR [2019] DJe, 23.

little detail as possible, which residences will be the target of state actions. However, the initiative is **notoriously illegal** and deserves repudiation as a utilitarian and offensive measure to one of the most sacred rights of any individual - whether rich or poor, resident of a mansion or a shack – i.e, **the right not to have his residence, their intimacy and dignity violated by actions of the State, outside of the hypotheses foreseen in the Constitution of the Republic and in the law** [highlights in the original]^{86, 87}

The precedent recognized the illegality of the measure but showed sympathy with the authorities and their work conditions, referencing the challenges of “local anguish and vicissitudes.” Besides, it reinforces the idea that favelas are places of poverty – but even the poor have rights – normalizing the motifs behind the violent choices made in police operations, while not questioning the patterns of spatial surveillance and control that end with black bodies.

These arguments are central to the racialization of space in Brazil, and a concrete consequence of racial segregation. The racist imaginary on how lives in favelas are associated with depravation and poverty has a chain effect on layers of institutional racism, as we testify on how the court case relates to those areas of the city. This has a dual impact: it reinforces racial segregation and the production of “forbidden zones” within the city, whilst fostering greater disinvestment in those areas, continuously cast as “illegal” or not “part of the city.”⁸⁸ Then, the role of the media, or entertainment

⁸⁶ *TJRJ v Cidadãos e Cidadãs Domiciliados nas Favelas do Jacarezinho e Conjunto Habitacional Morar Carioca* [2019] STJ HC n° 435-934-AgR [2019] DJe, 23.

⁸⁷ Authors’ free translation from original in Portuguese.

⁸⁸ Vera da Silva Telles, *A Cidade Nas Fronteiras Do Legal e Illegal*, vol 25 (Argumentum 2010).

industry – such as cinema - have helped to reify a stereotypical imaginary of slums in constant association with violence, poverty and finally, drugs. The film “City of God”⁸⁹ can be considered a good example of this portrayal.⁹⁰ Conversely, while those discourses perpetuate the focus on the “black problem”⁹¹ or the *favelas* as the city’s major concern, white segregation is not seen as problematic,⁹² particularly by those who hold decision-making power, including the judiciary, who often live in predominantly white middle-class neighborhoods. Lastly, if we take into consideration that most police operations are related to the so-called “war on drugs”, then racialization of space becomes more evident, whereas the association with poverty becomes more contradictory.

Lastly, most of the arguments brought in the complaint, while focusing on constitutional rights to argue about the unconstitutionality of the public security forces, lost the opportunity to deepen the analysis on how these so-called facts are guided by racist presumptions of black criminality that link race and space. Additionally, while denouncing the hate speech of the governor, which celebrated killing “criminals” while the deaths of children were labelled as “externalities,”⁹³ the petitioner’s argument might fall into the trap of insinuating that some lives are more valuable than others. Even if we

⁸⁹ *Cidade de Deus* (2002) or City of God by Fernando Meirelles and Kátia Lund is a film that addresses violence in the slums of Rio de Janeiro, focusing on the drug trafficking, but picturing the slums as territories of pure barbarism, according to Corrêa, “to reduce a favela to drug trafficking and violence, showing characters with animal stereotypes, is to establish a game of alterity with the spectator.” Felipe Botelho Corrêa, ‘As Projeções de Alteridade No Espaço Urbano Carioca a Favela No Cinema Brasileiro Contemporâneo’ (2006) 9 *Lumina* 51, 54.

⁹⁰ Felipe Botelho Corrêa, ‘As Projeções de Alteridade No Espaço Urbano Carioca a Favela No Cinema Brasileiro Contemporâneo’ (2006) 9 *Lumina* 51.

⁹¹ Clóvis Moura, *Sociologia Do Negro Brasileiro* (2a edição, Perspectiva 2019) 50.

⁹² Edward G Goetz, Rashad A Williams and Anthony Damiano, ‘Whiteness and Urban Planning’ (2020) 86 *Journal of the American Planning Association* 142. <<https://doi.org/10.1080/01944363.2019.1693907>>

⁹³ *PSB v Rio de Janeiro State* [2020] STF ADPF 635, [2020] DJe 267, 14.

consider that mobilizing the special protection of children's rights can be a good legal strategy, the difference in lives' value can leave extrajudicial killings of "criminals" mostly unquestioned.

CONCLUDING REMARKS

The use of helicopters to fire weapons from during police operations in favelas in Rio de Janeiro, as in the case of Maré, demonstrates that the use of law results from a necessity to keep "the racial Other firmly *in place*"⁹⁴ and are implemented simultaneously in the social and physical construction of space. The denial in the judicial field of institutional racism is an issue that should be considered a matter of legal process and strategy. Discussing racism, even for justice operators acting on behalf of "vulnerable communities," generates reactions from other sections of the system that use this argument to weaken the case, which in turn contributes to a widespread perception that institutional racism does not affect the justice system. In this context, using the argument of institutional racism in a complaint is read as politicization of the court case, since justice still operates according to formalist assumptions. The recognition that institutional racism affects the system results in contradicting its assumed neutrality. The same does not happen when one argues in terms of vulnerability and poverty, given that the justice system perceives socioeconomic conditions as objective, as opposed to race.

One can find a clear path in this case: public defenders described the use of class actions as strategic litigation to introduce institutional racism in the judiciary's agenda.

⁹⁴ Sherene Razack, 'Introduction: When Place Becomes Race' in Sherene Razack (ed), *Race, Space, and the Law: Unmapping a White Settler Society* (Between the Lines 2002) 2.

Rio de Janeiro's Court dismissed the Public Defender's Office demands and their arguments regarding institutional racism were met with denialism. As the case moved to the federal level however, the debate on race gained a different complexion. The color of the victims of state violence is considered and recognized. This condition is seen as a consequence of structural racism that places blacks in poverty, conveyed as a sign of vulnerability. Hence, black neighborhoods become vulnerable neighborhoods. Then, vulnerability is read as vulnerability to *commit* crime, justifying and legitimizing state violence. Racist presumptions (blacks are poor, therefore, criminal) are reinforced whenever there are attempts to denounce institutional racism. This contradiction became evident when the representative of Redes da Maré said (in a public hearing called within the court case) "favelas do not produce neither drugs nor weapons, but we are the ones targeted by the war on drugs."⁹⁵

The concept of institutional racism enables us to understand how day-to-day decisions taken by politicians, legal professionals, and institutions results in genocide. In this context, black death is central to sustaining power relations, normalized by racial stereotypes that create zones of dehumanization as criminality. Denialist discourses normalize this long-lasting condition and so, genocide manifests in extra-judicial killings. At the same time, the unconstitutional state of things is seen as a consequence of historical processes of violent escalation and deep socio-economic disparities; both of which are beyond the judicial system's control. Thus, the judiciary works to ratify racial inequality when it recognizes the racial bias of state practice but normalizes the

⁹⁵ In a paradigmatic decision in the case, Justice Fachin called for public hearings to open the debate to a larger public. They took place on the 16th and 19th of April 2021, the video is available at <http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=464270&ori=1>, accessed on 22 April 2021.

systematic production of differentiation. By recognizing racism as a discriminatory practice that should be outlawed, the justice system deals with the systematic killing of blacks as the result of individual decisions by police officers or governmental officials. In this context, the judicial system's "innocence" as a neutral state power is reinforced and the practices and decisions that result in black genocide are normalized in the routines of (in)justice.

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